

LAW AND LAWS

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Socrates is reported to have said that if there ever was a fellow who in his talks with other fellows always wanted to know exactly what he was talking about, he was, or at least he had always thought he was, that fellow. Surely it is important to know exactly what one is talking about. But it is not so easy to know that as might be supposed. There was a maxim of the old Roman law that all definition was dangerous. The analytical jurisprudence that undertakes to define "law" and "a law" and the different institutions of the law precisely and to lay out the content of systems of law in a set of thoroughly defined categories has not proved able to tell us to the satisfaction of the present generation of jurists what law is. Nor has the historical jurisprudence of the last century been able to tell us with assurance what the course of its historical development shows it must be, nor the law of nature jurisprudence what it is because it ethically must be, nor the metaphysical jurisprudence of the last century what it is because it philosophically must be.

To understand better what we shall be talking about it will be necessary to draw a distinction.

In the beginnings of civilization men think of a wise or divinely inspired law-giver who established canons of conduct for his people. In time the wise or inspired personal law-giver was succeeded by a body of wise custodians of the traditional experience of adjusting relations and ordering conduct in increasingly civilized communities. To them succeeded the declared wisdom of the appointed law-giving organ of independent politically organized societies. It may be that a universal political organization of the world with a universal law-declaring organ may be the next step. But as the legal order matures, we have to think of law, not merely of laws, or of law as only an aggregate of laws. We more and more think of principles discovered by wisdom applied to experience and experience organized by reason.

Moses, Manu, Lycurgus, Numa gave laws to peoples in the form of rules of conduct, as is well brought out in Jethro's admonition to Moses: "And thou shall give them ordinances and laws and shalt show them the way wherein they must walk and the work that they must do." Something of the same idea may be seen in the mythical ascription of the foundation of the common law of England to Alfred.

In the popular idea law is thought of in terms of the criminal law. Tony Weller firmly believed that the Old Bailey was the court of last resort and that the appropriate defense to a civil action for damages

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was an alibi. Indeed to the bulk of the population law means policing and the traffic court, as the tribunal with which it is most familiar, stands for the type. Television, portraying criminal trials and violent encounters, makes policing appear as the legal order of society. The dramatic ceremony by which a legal proceeding began in the formal action at law in the older Roman law brings this out. It pictures a violent quarrel in the course of which the King, as a magnified chief of police in the small town of the regal period, called out *mittete ambo*, "let go both of you" and, each having stated his claim, pronounced "let Titius be judge." The magistrate's function was one of policing. The legal order was a system of policing a small country town.

Policing is a local function. A policing theory of law is, therefore, a local theory.

Beseler spoke of an idea of local sovereignty, by a term which I like to translate "mainstreetism," as characteristic of the peoples of northern Europe. It is characteristic of our Anglo-American common law in the form of political faith in home rule and a legal cult of local law, in contrast to the faith in universal law which, after the reception of Roman law as developed by the classical jurists of the empire from the first to the third century, became the civil-law system of Continental Europe.

Very likely you may feel that I shall do no better by a sociological method. Certainly sociological method has not been or become fashionable with jurists and perhaps I can claim no more for it than that we should at least treat the science of law as one of the social sciences. Perhaps it is enough to say assuredly what law is not. For there is only mischief in the proposition of the analytical school that law is an aggregate of laws.

According to Austin, the founder of English analytical jurisprudence, a law is a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. Law is an aggregate of rules thus established. But what we really have to be talking about is the legal order—in French *ordre juridique*, in German *Rechtsordnung*—the process of adjusting relations and ordering conduct in civilized society in accordance with precepts derived from experience developed by reason and reason tested by experience. The difference between "law" and "a law" is not so brought out in our English terminology as it is in the Latin *ius* and *lex*, the French *droit* and *loi*, or the German *Recht* and *Gesetz*. There is a certain plausibility in saying that law is an aggregate of laws which does not impress us if we are told that *droit* is an aggregate of *lois*, or *Recht* an aggregate of *Gesetze*. The words *ius*, *droit*, *Recht*, express an idea of what is right and just and hence suggest law as something which has got beyond the stage of the police state, whereas *lex*, *loi*, *Gesetz* express an idea of what is commanded, or literally laid down, and so are appropriate to the police state and the police ordering of a simple

local society.

Juristically or juridically found general principles are inadequate to special local needs as legislative making of laws is inadequate to the tasks of a system of general law. A striking example is afforded by American experience of utilizing the water of running streams. Where streams with a steady regular flow of water of sufficient quantity to admit of use by many are at hand, the problem of admitting the widest possible use of natural media by the most of those who are in a position to use and desire to use them, of satisfying the most reasonable expectations we can with the least friction and waste, is met by limiting use of the water to owners along the banks and limiting use by each to what will allow of like use by all. But if applied to arid regions in some states this would have the effect of preventing any effective use by any one of such water as is at hand. In such cases special local geographical conditions call for special legislative rules in place of the principle ascertained by experience developed by reason in the process of adjudication which obtains generally both in the Anglo-American common law and in the civil law of Continental Europe and Latin America. It is significant, moreover, that the local legislative rules differ widely in the different jurisdictions which depart from the principle of the Anglo-American common law and the Continental civil law, although there may be common conditions in the divergence which call for local legislation.

It is true that the function of laws, as distinguished from law, is not confined to the exigencies of the police state. A law is a rule. That is, it is a precept prescribing a definite detailed consequence for a definite detailed fact or state of facts. Such precepts are called for even in the most advanced societies where local economic, historical, or ethnic conditions, sometimes more compelling at least for a time, as local geographical conditions require differentiation of particular regions or districts or communities.

The Germanic peoples that set up local kingdoms after the downfall of the Roman empire brought back a regime of legal localism. This gave way before the revived study of Roman law in the universities after the twelfth century and consequent reception of Roman law on the Continent after the fifteenth century. Universal thinking about law was given vogue by the law-of-nature jurists after Grotius (1625). But it only scratched the surface in England, and the rise of the English analytical jurisprudence after the middle of the nineteenth century effaced the scratches. As late as 1901, Maitland could say, in his lectures on English Law and the Renaissance: "We have all been nationalists of late. Cosmopolitanism can afford to wait its turn."

Laws are rules. But law makes use of principles, *i.e.*, authoritative starting points for legal reasoning; conceptions, *i.e.*, precepts defining categories of fact or situation to which certain rules, principles or standards are to be applied (*e.g.*, sale, bailment, trust); and standards, *i.e.*, measures

of conduct instead of rules prescribing or proscribing details of action.

What the jurist must insist upon is that the vital, the enduring part of the law is in principles, starting points for legal reasoning, not in rules. Principles remain relatively constant or develop along constant lines. Rules are relatively short-lived. They do not develop. They are repealed or are superseded by other rules.

Recently I had occasion to study legislation of Illinois under its Constitution of 1848 and its present Constitution of 1870. Two statutes attracted my notice: one providing a bounty for killing wolves and one against setting fire to the prairie. The former did not prove ever to have raised a question calling for a reported decision. The supreme court of the state had occasion twice to decide cases involving prairie fires, but decided them on general principles of the law of negligence, not upon the statute. Here we have examples of special local conditions calling for rules and of the relation of such conditions to the law. Wolves and prairie fires were local conditions of pioneer Illinois. The rules provided for those conditions disappeared with them and left no mark upon the law. The general proposition as to care in the course of individual conduct and casting of risk of injury on others and the standard of care and principle of liability for conduct not in accord therewith have remained unaffected.

Advancing civilization brings with it law, and with law there come to be law schools. "Law schools," said Maitland, "make tough law." As they develop they teach law, not laws; principles not rules. They train practicing lawyers who become skilled in application of principles and standards and in principles of interpretation and application of rules.

"No later movement—not the Renaissance, not the Reformation," so Maitland tells us, "draws a stronger line across the annals of mankind than that which is drawn about the year 1100 when a human science [of law] won a place beside theology." When in place of the divinely inspired law giver men began to think of the wise custodian of the received customs of a people, there began to be law, which could be taught and studied. The outstanding examples are the Roman law, taught, commented upon and expounded in treatises by a long succession of jurists from the fourth century B.C. to the time of Diocletian—roughly six hundred years—which culminated in the Digest of Justinian (A.D. 533) and the English common law. The latter was taught and studied by a succession of practicing lawyers probably from the time of Edward I (thirteenth century). The common law so taught and developed in a long course of reported judicial decisions from the thirteenth century to the present, has not been reduced to legislative form by codification except in three of the United States where, however, the codes so far as they have to do with the everyday administration of justice in the society of today have in effect been treated as declaratory. Moreover the legislation of Justinian became a subject of study and teaching in the Italian

universities of the twelfth century, and was taught, commented upon and thus developed by jurists till a new era of codification set in at the end of the eighteenth century. But the codification of this era, like that of Justinian, was law declaring rather than lawmaking. Absolutist political thinking in the seventeenth and eighteenth centuries led to political ideas of law as something made out of whole cloth by the sovereign in the form of rules or commands. Law was the will of the sovereign; finding of law by juristic study and judicial experience was in contravention of the sovereign lawmaking function. The code of Frederick the Great (1728) and the Prussian code following it (1791) forbade even interpretation by the courts. If the meaning was not clear, the question was to be referred to the Code Commission for an authoritative answer. The French Civil Code of 1804 and the Austrian Code of 1811 forbade the judges deciding cases by way of a general disposition "or so as to formulate a rule." Even in the common-law world we used to hear declamation against "judicial legislation" when legislative texts were unclear or wanting or there were no governing precedents. But the practical exigencies of administering justice according to law have required this mode of thought to be given up. Indeed the French Civil Code, which was the model for nearly a century, was characteristically more declaratory of principles than a book of rules.

In the revision of the French Civil Code now in progress, the provision forbidding judicial finding of law and confining the courts to genuine interpretation and application of actual texts, which had become practically obsolete, are now replaced by provisions as to the materials which the courts may use in judicial law finding in the course of decision. This device, already adopted in the German Civil Code of 1900, has been finding its way into all recent codes and marks a definite giving up of the idea that law can only be a body of laws; that legal precepts must be rules of legislative origin.

In truth, the idea that law is a body of laws—of rules laid down by the lawmaking organ of a politically organized society—an idea long urged by analytical jurists and assumed not uncommonly by writers on political science in the past, is at variance with the actual course of the administration of justice according to law in the civilized world as it has been since the Roman law was the law of the world in antiquity and the Civil Law and the Common Law became the dominant systems in the world of today.

With the expansion and unification of the economic order it becomes a chief problem of the science of law to maintain a balance between the general and the local. In the science of politics it is a problem of adjusting a general ordering of society as a whole and local self government. In jurisprudence it is one of universal principles for guiding the general adjusting of relations and ordering of conduct of life in society, on the one hand, and on the other hand, of prescribing detailed rules to meet

local exceptional conditions. The two fields are quite distinct. But they merge along a boundary not always easy to draw with exactness. There is a tendency to stress general principles, on the one hand, or detailed rules, on the other hand, according to historically drawn lines of the time and place. Hence detailed legislation shaped to local modes of thought of the past may hamper judicial working out and application of principles. On the other hand, judicially found and formulated principles may confuse the application of salutary rules for local administration. It is here, it may be remarked in passing, that there is likely to be a difficult obstacle to overcome in the quest of a law of the world to which your generation may well be looking forward. To work out a theory of the relation of local legislation and administration to unified principles of law for an economically unified world may be a compelling task for the jurists of tomorrow.

Since the classical Greek philosophers and the Roman jurists who were their pupils, men have sought a solution of the task of adjusting the local to the general in law by means of a theory of natural law. This theory of a universal ideal, of which the body of legal precepts anywhere is to be only a reflection, has played a great part in the history of law. But systems of natural law in the past have been idealized versions of the body of established legal precepts of the time and place. I have been in the habit of calling them systems of positive natural law. Whether a natural natural law can be laid out by some jurist of tomorrow, who can shake off the supposed ideal propositions in which he has been trained, I will not attempt to prophesy. I submit, however, that we are likely to achieve more in the endeavor to bring the law of our generation up to the requirements of the time than in ambitious attempts to lay out a system adequate to the juristic needs of the world for time to come.

Let me repeat, the enduring part of the apparatus of administering justice is in principles, not in rules. This was well brought out in Jethro's admonition to Moses. He was not to threaten or command. He was to show the people the way in which they were to walk and the work that they were to do. The commandments did not proceed from a sovereign human legislator.

History of law begins when crude attempts to organize social control through limitation of self help in kin-organized society take form in a legal order. We may recognize four stages of development from that point. I have been in the habit of calling them: (1) the strict law, (2) equity and natural law, (3) the maturity of law, and (4) the socialization of law. They may be characterized thus. In the stage of the strict law, which is represented in Roman law by the *ius civile* or law of the old city, and in our own system by the common law as opposed to equity, law as distinguished from religion and morals has definitely prevailed as the primary regulating agency of society. Normally men

apply only to the appointed agencies of the law to redress wrongs. Hence the body of rules determining the cases in which men may appeal to these recognized or appointed agencies for help comes to define indirectly the substance of rights and thus indirectly to point out and limit the interests secured. In this stage fear of arbitrary exercise of the power of public help for individual victims of wrong operates to produce a narrowly limited system. The chief end which the legal order seeks is certainty. Hence the cases in which the legal order will interfere and the manner in which its interference may be invoked are defined by a body of wholly hard and fast rules. In this stage law is a body of rules and the rules are wholly inelastic and inflexible.

A stage of liberalization, which I have called the stage of equity and natural law, succeeds the strict law. This stage is represented in Roman law by the period of the *ius gentium* (law of nations—i.e., of the neighboring peoples with whom the Romans had business and social relations) and *ius naturale* (natural law). In English and Anglo-American law it is represented by the rise of the Court of Chancery and development of equity. In the law of Continental Europe it is represented by the period of the law-of-nature school of jurists, the seventeenth and eighteenth centuries. The watchword of the stage of the strict law was certainty. The watchword of this stage is morality or some phrase of ethical import, such as good conscience, *aequum et bonum* or natural law. The former insists upon uniformity, the latter upon morality; the former upon form, the latter upon substance, by which it means justice in the ethical sense; the former on remedies, the latter on duties; the former on rule, the latter on reason. The capital ideas of the stage of equity and natural law are identification of law with morals, the conception of duty and attempts to make moral duties into legal duties. It relies upon reasoned ethical principles rather than upon arbitrary rules to keep down caprice and the personal element in the administration of justice.

As the result of a stiffening process, by which the undue fluidity of the application of law and the over-wide scope for discretion involved in the identification of law and morals are gradually corrected, there comes to be a body of law with the certain and stable qualities of the strict law yet liberalized by the conceptions developed by equity and natural law. In the stage of what has been called the maturity of law the watchwords are equality and security. The former idea is derived from the insistence of equity and natural law upon treating all human beings as legal persons and upon recognizing full legal capacity in all persons possessed of normal wills, and partly from the insistence of the strict law that the same remedy shall always be applied to the same state of facts. Accordingly equality is taken to include two things: Equality of operation of rules of law and equality of opportunity to exercise one's faculties and employ one's substance. The idea of security is derived

from the strict law, but is modified by ideas of equity and natural law, especially the idea of insisting upon will rather than form as the cause of legal results and idea of preventing enrichment of one at the expense of another through form and without will. In consequence security included two things. The idea that every one is to be secured in his interests against aggression by others, and the idea that others are to be permitted to acquire from him or exact from him only through his will that they do so or through his breach of rules devised to secure others in like interests.

In order to insure equality the maturity of law again insists strongly upon certainty and in consequence this stage is comparable in many respects to the stage of the strict law. It is greatly in advance of the strict law, however, because it insists not merely on equality of legal remedies but on equality of rights, that is, equality of capacities of controlling actions of others through the legal order, and conceives of application of remedies as only a means thereto. To insure security the maturity of law insists upon property and contract as fundamental ideas.

At the end of the nineteenth century a significant change was beginning to be manifest throughout the world. In economics there was a giving up of the classical political economy. In politics there was the rise of the social service state. In jurisprudence there was growing recognition of interests as the ultimate idea behind legal rights. Jurists came to think of so-called natural rights as something quite distinct in character from legal rights; that they are claims and expectations which human beings may reasonably assert, whereas legal rights are means which the legal order employs to give effect to such claims within certain defined limits. But when natural rights are put in this way it becomes evident that these individual interests get their significance for jurisprudence from a social interest in giving them effect. In consequence the emphasis has come to be transferred gradually from individual interests to social interests under which they may be subsumed. Such a movement may be seen in the law of all countries today. Its watchword is satisfaction of so much of human claims or demands or expectations as we can with the least sacrifice of particular expectations. This stage of legal development has been called the socialization of law.

Some examples of the socialization of law will serve to mark its significance. One of the first to appear was limitation of the use of property, forbidding exercise of some of the legal liberties of an owner. Also there have come to be limitations on the owner's power of disposing of his property, imposed to protect interests of members of his family. Also the law as to trespass upon land has been more and more relaxed. There has been a tendency to give effect to a social interest in conservation of social resources by restriction of the individual's power of acquisition. There has come to be much limitation of freedom of contract by prescribing standard contracts or standard clauses, prescribing terms of

employment and modes of employment bargaining. Contracts are increasingly made over in order to make more equitable the terms agreed on by the parties. There is increasing extension of liability to make reparation for personal injuries because of the mechanizing of activities of every sort and employment of agencies likely to get out of hand and threaten the social interest in the general security. More and more public funds are required to respond for injuries to individuals by public agencies and the legal immunities of states, municipalities, officials, and hospitals are everywhere given up. In securing the social interest in the individual life, limitations are imposed upon the power of a creditor or an injured person to obtain full satisfaction from one who has dependents for a debt or liability to repair an injury. Individual interests in the domestic relations are limited in order to secure the social interest in dependents. There is a tendency to modify the purely contentious conception of litigation by one of adjustment of interests.

Here we are at the moment. But there is no reason to suppose that the response of the legal order to advancing civilization will stop here. I do not profess to prophesy. But there is much to suggest that we may be moving toward a further stage which may be one of a law of the world.

For the examples of socialization of law I have given are significant of judicially or juristically worked out principles that give them their real meaning. As they take shape in the legal order they are not rules made to conditions peculiar to time and place by legislative organs of a politically organized society. In successive stages of development of the legal order each later stage builds upon the preceding stage. To the principle of certainty established by the strict law, the stage of equity and natural law adds the upholding of morals, the maturity of law adds to both the promoting and maintaining of the demands or expectations of the individual human being, and to all this the socialization of law is adding the promoting and maintaining of the expectations common to all men in a crowded and mechanized world where we must live and move and have our being in cooperation with our fellow men. May it not be that the watchword of the next stage may be some derivative of the word "humanity"?

When I look back, to the law which I studied in law school in 1889 and sought to practice when I came to the bar in 1890, what impresses me most is the change that has come over the law in the giving up of the extreme localism of the American lawyer of the last century. There was and long had been a cult of the local law. I well remember that as late as 1903 a book published by a bar examiner for an important state exhorted the student to study carefully the statutes of the state, especially those relating to practice and procedure in the courts, because, he explained, it was established that of all bodies of law, the laws of that state were the very best. This attitude was by no means confined to

particular common-law jurisdictions. In reaction from the eighteenth-century idea of all positive law as a reflection of an ideal body of rules of natural law of universal and eternal validity, it seemed to be held as a matter of course that the laws of the time and place were the law; that they had a sufficient basis in the local political sovereignty, and that they could be thought of adequately in terms of that sovereignty. Its political independence explained and justified itself as well as all the details of its lawmaking.

Blackstone had defined a law as a rule of civil conduct prescribed by the supreme power in a state. The law of property was a body of rules. They could be thought of in this fashion, and as most of them had come down from an age of strict law and the law of property in land has always been thought of as calling specially for strict rules, taking them for the type of legal precepts had bad consequences for the Anglo-American law of torts from which our law has not been delivered wholly even today.

The law of torts was first taught as a body of rules—of rules defining the name torts: rules as to assault and battery, false imprisonment, malicious prosecution, slander, and libel. As short a time ago as when I was a student in law school, liability for negligence was not thought of clearly as a matter of principle and standard. Even Holmes at one time looked forward to seeing it reduced to rules analogous to those determining estates in land or the rules as to succession in case of intestacy. There were rules as to negligence per se. Standing on the back platform of a moving car, holding one's elbow out of the window of a moving car, getting on or off a moving train, no matter what the circumstances, were in themselves by rule of law negligence. Rules of this sort were applied to railroad accidents as late as 1903, but are now given up as rules almost everywhere. Today we think not of a tort of negligent conduct, defined and governed in its application by rules, but of a principle of liability for casting an unreasonable risk of injury upon another.

Trade and commerce have always been a force for breaking down barriers and setting human relations free from fixed burdens imposed by political organization. What of such burdens still holds on is being done away with by air transportation which has been making the most remote regions next door neighbors of each other.

But in the law of today the most effective solvent of detailed rules, statutory definitions and rigid statutory fixed categories, has been the multiplicity of new instrumentalities of danger to life and limb in the doing of everything by machinery that was formerly done by hand; the highly organized industrial activities in which one must encounter not men but machinery and has to reckon with dangers far beyond individual intentional aggression or ill motivated want of care. When what used to be done in the home with a spinning wheel is done in a textile mills

involving new relations of employer and employee, new problems of corporate organization, of conflict of public and private interest, of new problems of health, safety and welfare of groups of co-workers, and of conflict of interest among groups of co-workers, and of conflicts between groups instead of between single individuals, the whole picture of adjusting relations and ordering conduct has to be changed radically, and this has had to be done in decades where development of legal institutions and doctrines and technique had gone on slowly for centuries. Today baking and cooking that used to be done in the home are done in factories. As it has been said, the housewife of today cooks with a can opener. What used to go directly from the household garden to the household cook and thence to the table now goes from the industrialized superfarm to the factory, to the manufacturer, to the wholesaler, to the retailer, to the housewife, with problems as to warranty, intervening or supervening negligence and causation which our courts have to dispose of as well as they can with the simple terminology and categories of the past.

Again, compare the farming of the times in which our law was formative with the rising industrialized agriculture of today. It is not merely a matter of comparing reaping and threshing with sickle, cradle, and flail, as in my grandfather's time, with the mechanical process by combined reaper and threshing machine, or comparing the cutting and stacking of hay with scythe and pitchfork of my boyhood with the mowing and stacking machinery and hay-baling machines of today. The old-time farmer, farming his own farm with the help of his hired man, the individual agriculture of yesterday, with its simple relations of one man with another man, is coming to be replaced by an industrial agriculture which has raised questions analogous to those raised by mill and factory, such as the "simple tool rule" for the farm to parallel the "assumption of risk rule." What once applied to the factory is taken over for the great fruit farms, and industrial agriculture and orchard operation on a large scale are calling for workmen's compensation for agricultural injuries. These changes, which are still going on, call for a remaking of the law of liability in order to secure social interests in need of more effective securing than afforded by what sufficed well enough for the simple individual farmer of yesterday.

Also compare travel today with the conditions of travel for which our law of liability was worked out in the formative era. Compare the family horse and buggy and the farm wagon with the automobile of today; the delivery wagon with the motor truck; the stage coach with the railroad now that streamlined trains are run on four to six track roads at one hundred miles an hour. Compare even this last with the motor bus and the airplane. The slaughter on the highways on holidays, which rises to the proportions of the battlefield, raises problems beyond what lawmaker or law writer could think of in the era of policing and

of the criminal law. Indeed how to organize, provide suitable judges for, and equip traffic courts adds to the sufficiently difficult problems of organization of courts in the states.

If transition from horse power to steam power made trouble for my father's generation when called on to measure principles of legal liability, and transition from steam power to gasoline power makes trouble for mine, what shall we say of the troubles ahead for your generation when it is called upon to wrestle with problems of liability for injuries inflicted by atomic powered machinery?

But injuries to life and limb in industry and in the course of travel are by no means the whole story. For example, we are told that provision for the calculated number of killed and injured in the course of constructing a modern building in the metropolitan city of today is now reckoned as an item in the cost.

In the Anglo-Saxon law we are told of the safety of the home-sitting man. The law secured him while he was in his house. The house peace—the exemption of the house from violence in breach of the peace—was under the protection of the whole body of the free men of the community. He was safe so long as he stayed in his own home. Elsewhere he must expect to be with dangers compassed round. Gradually a system of peaces was evolved to protect him from intentional aggression in most of the serious occupations which might take him out of doors. In time there was general legal protection against attack by others. But the system of legal protection from intentional attack from which our law has developed is no longer adequate to secure even the home-sitting man. Motor trucks and cars crash into houses. Airplanes plunge into them or explode and bombard them. The superseding of water power by electric power has created a new menace in the high tension wires, crossing field and highway, which become displaced by storm or accident and inflict the most terrifying injuries. The multiplication of means of injury even to one who is abiding quietly in his own home, calls for rethinking the principles of liability.

In the old writ in the common-law action of trespass *vi et armis* it was set forth that the defendant attacked the plaintiff with swords, staves, and knives. But swords and knives did not go off half cocked nor was it necessary while handling staves and spears to be careful to be sure that they were not loaded. Even a bow and arrow had a short range. They could not kill at a thousand yards.

It long ago proved hopeless to frame and reframe rules to keep pace with the development of means of inflicting injury.

As I said a generation ago, and it is even more palpable today, law must be stable and yet it cannot stand still. The very essence of life is movement and the living organism cannot stand forever changeless and survive. Law which governs life must change as life changes. But this does not mean that you are to be discouraged by thinking that what

you have laboriously learned as law is something fleeting that will pass away. As Coke put it, in the time when the medieval land law was being made a foundation for the law of modern England, that was to become the law of the English-speaking world, "out of the old fields must grow the new corn." The law of tomorrow will not be made out of whole cloth by the legislative fiat of an omniscient lawgiver. It will be made as law in living and growing societies has always been made, by juristic and judicial application of reason to experience of the administration of justice in the past and testing of that reason by further experience of the administration of justice according to law.

Thus there will be abundance of work for each and all of you to do in helping bring the law of your day abreast and keeping it abreast of its tasks, as its tasks change from age to age. I have put one example of what there will be for you to help do in the law as to liability. There is work to be done in that part of the law, beyond what I have suggested, in assuring a balance of the security of the individual life and of free individual self assertion. For free individual self assertion is basic to the economic order. The individual lawyer by thorough performance of his duty of advising his clients and advocating their causes is a builder of the law. For the law is built in this way. It grows through the everyday work of the lawyers.

Each of you will have abundant opportunity, as practitioner, as judge, as law teacher, or as legislator to contribute to the work of advancing the administration of justice. If, as Daniel Webster declared, justice is the great interest of man on earth, you are assured of no mean role in life in promoting and maintaining that interest.

It may even be that your generation may see the advent of a law of the world—something which prophets, kings, philosophers, statesmen, and even poets have foretold or planned or urged or striven to bring about.

One cannot put this better than did Sir Frederick Pollock in his lectures to the students of law at Oxford:

So venerable, so majestic is this living temple of justice, this immemorial and yet ever freshly growing fabric of the common law, that the least of us is happy who may hereafter point to so much as one stone thereof and say, the work of my hands is there.

Possibilities of work for your hands are and even more will be opening on every side of an increasingly complex legal order, as it moves toward a legal order of the world. In his every day practice the well trained, zealous and courageous lawyer of tomorrow, mindful of his calling to promote the chief interest of man on earth, may find more than one place where he may contribute one stone toward advancement of justice among men.